29816 SERVICE DATE - JANUARY 19, 1999
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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41180

LAND O'LAKES, INC.--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF CENTRAL DISTRIBUTION CARRIERS, INC.

Decided: January 14, 1999

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the District Court of Ramsey County, Second Judicial District, State of Minnesota, in Central Distribution Carriers, Inc. v. Land O'Lakes, Inc., File No. C6-93-5800. The court proceeding was instituted by Central Distribution Carriers, Inc. (Central or respondent), a former motor common and contract carrier, to collect undercharges from Land O'Lakes, Inc. (Land O'Lakes or petitioner). Central seeks undercharges of $87,591.15 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 189 shipments of foodstuffs between August 27, 1987, and July 10, 1990. The shipments were transported from Fridley, MN, to points in Minnesota[2] and the Upper Midwest. By order dated

[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] Of the 189 shipments identified in respondent's amended court complaint to collect undercharges, 94 were destined to points in Minnesota (Exhibit D to Petition for Declaratory Order). Although petitioner maintains that each of the Minnesota-destined shipments were transported in interstate commerce, the record in this proceeding does not provide sufficient basis to allow for a

(continued...)

October 26, 1993, the court stayed the proceeding and referred the matter to the ICC for determination of all issues lying within its primary jurisdiction.[3]

Pursuant to the court order, Land O'Lakes, on December 23, 1993, filed a petition for declaratory order requesting the ICC to resolve issues of contract carriage, interstate commerce, and rate reasonableness. By decision served January 10, 1994, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. By decision served January 18, 1994, the ICC established a second procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the NRA and to submit evidence and argument with respect to that provision. Petitioner filed its opening statement on April 18, 1994. Central failed to submit a reply, and indeed has failed to make an appearance or otherwise participate in any aspect of this proceeding.[4]

Petitioner contends that Central's effort to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA or, alternatively, that Central transported the subject shipments as a contract carrier pursuant to a written agreement. Land O'Lakes asserts that, in July 1986, it and respondent entered into a written agreement under which respondent was to provide transportation services at flat rates specified in the agreement. According to petitioner, the rates were adjusted on several occasions, as reflected in correspondence between the parties; respondent transported numerous shipments for petitioner; for each of the subject shipments, respondent billed

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[2](...continued)
determination as to whether the movements between points in Minnesota were interstate or intrastate in nature. As the Board has no jurisdiction over intrastate shipments, this decision has applicability solely to interstate movements. The parties are advised, however, that claims based on shipments that may have moved in intrastate commerce have been extinguished by the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-105, 105 Stat. 1605, 49 U.S.C. 14501(c) (FAAA Act). See Pennsylvania Power & Light Company--Petition for Declaratory Order--Certain Rates and Practices of Friedman's Express, Inc. et al., STB Docket No. 41936 (STB served Jan. 28, 1998) and St. Johnsbury Trucking Co., Inc. v. Mead Johnson, 199 B.R. 84, 87 (S.D.N.Y. 1996).

[3] The court directed petitioner to institute a proceeding before the ICC.

[4] By decision served June 22, 1995, the ICC directed Central either to file a reply or to show cause why this proceeding should not be decided on the existing record. Central did not respond. Under 49 CFR 1112.3, a party that fails to comply with the schedule for submission of verified statements is deemed to be in default and to waive any further participation in the proceeding. Central's failure to participate in this proceeding should bind it in the court proceeding to the record developed before the agency. See Carriers Traffic Serv. v. Toastmaster, 707 F. Supp. 1498, 1505-06 (N.D. Ill. 1988) (carrier on court referral must "live with the record it has made (or failed to make)" before the [Board] when pursuing its undercharge proceeding in the courts).

petitioner in accordance with the rates specified in the agreement and the amendments thereto; and petitioner paid respondent the amounts billed.

Attached to the petition for declaratory order are the following items:

> (a) A copy of a letter dated July 1, 1986, from Central's sales representative to petitioner confirming the existence of an agreement between the parties and specifying certain rates and terms (Exhibit A).
> (b) Letters from Central to Land O'Lakes dated September 9 and October 5, 1988; December 11, 1989; June 20, 1989; and February 22, 1990, identifying adjustments to the rate schedule as well as a schedule of rates bearing the date June 25, 1990 (Exhibit B).
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> (c) An affidavit from Mr. Craig R. Wylie, Vice President of Central, stating that he negotiated the July 1, 1986 agreement with Land O'Lakes and that the services provided by Central were billed in accordance with the agreement and subsequently negotiated changes (Exhibit C).
> (d) Attachments submitted by respondent in its amended court complaint that list each of the subject shipments, the originally assessed charge, the asserted corrected billing, and the balance due claimed by respondent (Exhibit D).

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[5]

[5] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

It is undisputed that Central is no longer an operating carrier.[6] Accordingly, we may proceed to determine whether Central's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a listing of the subject shipments submitted in respondent's court complaint indicating the originally billed charges assessed by respondent and paid by petitioner. An examination of the listing indicates that the originally billed charges were consistently and substantially below those that Central is now seeking to assess. In addition, the record contains copies of letters from representatives of Central to representatives of Land O'Lakes acknowledging the existence of an agreement between the parties and confirming adjustments to originally agreed-to rates. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that the written evidence need not include the original freight bills, or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

In this case the evidence indicates that the parties conducted business in accordance with agreed-to negotiated rates. The July 1, 1986 letter and subsequent letters from Central to petitioner as well as the consistent application of original charges significantly below rates that respondent is here attempting to assess confirms the unrefuted testimony of Mr. Wylie and reflects the existence of negotiated rates. The evidence further indicates that Land O'Lakes relied upon the agreed-to rates in tendering its traffic to Central.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than a rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section

[6] Board records indicate that Central's outstanding operating authority was revoked as of April 25, 1991. In addition, petitioner submitted a Minnesota court decision, dated February 15, 1994, indicating that Central was no longer an operating entity.

2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that Land O' Lakes was offered negotiated rates by Central. Petitioner tendered freight in reasonable reliance on the offered rate. Central billed and collected the negotiated rate. Now Central is seeking to collect additional payment based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Central to attempt to collect undercharges from petitioner for transporting the shipments at issue in this proceeding.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable Joanne M. Smith
State of Minnesota District Court for the
Second Judicial District
County of Ramsey
Room 1050 Court House
Saint Paul, MN 55102

Re: File No. C6-93-5800

By the Board, Chairman Morgan, Vice Chairman Owen, and Commissioner Clyburn.

Vernon A. Williams
Secretary